Petition

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IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1981

In re Westley Williams, *et. al., Petitioners*

PETITION FOR A WRIT OF MANDAMUS TO THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

1. Whether Writ of Mandamus lies because the United States District Court for the District of Columbia should be prescribed to exercise jurisdiction in Petitioners' case under the Foreign Sovereign Immunities Act, 28 U.S.C. §§1605(a)(5) and 1603(c).

2. Whether the United States District Court for the District of Columbia shall be ordered to take jurisdiction "of taking issue" and have that issue determined by a jury.

3. Whether the United States when it intervened should be required to take the case as it found it, therefore this court should order the United States District Court to hold a trial with the United States as Defendant.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

In re Westley Williams, et. al.,
Petitioners

PETITION FOR A WRIT OF MANDAMUS TO THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Westley Williams, et. al. and Steven Lauterbach, et. al. hereby petition for the issuance of a Writ of Mandamus to the Honorable Gerhard A. Gesell, District Judge of the District Court for the District of Columbia, directing that Court to vacate its opinion and dismissal filed on June 11, 1981 and try the case with a Jury with the United States as Defendant; in the alternative, order Judge Gesell to vacate that portion of his order in which he ruled there was no jurisdiction over Iran under the Foreign Sovereign Immunities Act.

OPINIONS BELOWS

The opinion and dismissal of Petitioners' action of the District Court of the District of Columbia filed on June 11, 1981, are not reported.

JURISDICTION

This Petition for a Writ of Mandamus invokes the jurisdiction of this Court under 28 U.S.C. §1651(a) and Rule 26 of the Rules of this Court.

STATEMENT

This case arises out of the events which occurred in Iran on November 4, 1979. On this date, agents of the Iranian Government stormed and took over the American Embassy compound and held captive over seventy United States nationals. Among these U.S. nationals were the Plaintiffs in the two cases, *Westley Williams, et. al.* vs. *State of Iran, et. al.* and *Steven Lauterbach, et. al.*, which were consolidated by the United States District Court and later by the United States Court of Appeals.[1]

On or about November 19, 1979, Plaintiffs Williams, Quarles, Hughes, Rollins, Maples, Johnson, and Montagne were released from custody by the Iranian authorities. Plaintiffs Williams and Quarles filed suit in the U.S. District Court on December 6, 1979. Plaintiffs Hughes, Rollins and Maples were added on March 27, 1980.

Also on March 27, 1980, Plaintiffs Mark Lijek, Cora K. Amburn-Lijek, and H. Lee Schatz were added to the original Complaint. In addition, the immediate family members of the "hostage Plaintiffs" were also added, those Plaintiffs being Delia M. Mallory, Laura Reeder, Marie Quarles, Jo Ann Hughes, individually and as Mother and Next Friend of Pechelle D., Tracy Y. and Sean O. Hughes, minors, Judith M. Rollins, individually and as Mother and Next Friend of Patricia L. and Terry Lynn, minors, Claude Lee Maples, Jessie L. Maples, Frank F. Lijek, Wanda T. Lijek, Joseph E. Amburn, and Setsuko Amburn. Mark Lijek, Cora K. Amburn-Lijek, and H. Lee Schatz had been falsely imprisoned in Iran from November of 1979 to February of 1980

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[1]An appeal in these two cases is now pending before the U.S. District Court for the District of Columbia, which stayed the appeal pending action on the instant Petition.

and escaped with the assistance of the Canadian Embassy on February 13, 1980.

Plaintiffs Steven Lauterbach, who was imprisoned from November 4, 1979 to January 20, 1981, Lillian Johnson and Elizabeth Montagne, who were imprisoned from November 4, 1979 to November 19, 1979, filed suit in the U.S. District Court on February 13, 1980.

All of these cases were consolidated on June 11, 1981 in the U.S. District Court.

On March 26, 1981, the United States intervened as a party Defendant in the Williams case and in the Lauterbach case on June 11, 1981. After the United States intervened, it filed an Answer to Plaintiff's Complaint and a Motion to Dismiss. On June 11, 1981 the U.S. District Court granted the United States' Motion to Dismiss and thereby dismissed the Complaint and the Counterclaim, and thereby denied Plaintiff's Motion to have United States' Motion to Dismiss certified as a Declaration of Taking and denying Plaintiff's Motion for Summary Judgment, said Motion filed on March 13, 1981.

Of all the hostage Plaintiffs involved in this action, only Steven Lauterbach was held captive for the full 444 days. The other Plaintiffs did not obtain their freedom through the Executive Agreement known as the Algerian Agreement.

SUMMARY OF ARGUMENTS IN FAVOR OF GRANTING A WRIT OF MANDAMUS

1. The Writ of Mandamus shall issue to compel the inferior Court to exercise its prescribed jurisdiction, 28 U.S.C. Section 1603(c). The Foreign Sovereign Immunities Act clearly vests the United States District Courts with jurisdiction over a foreign state.

2. The Writ of Mandamus should be granted for the reason that Petitioners have no remedy in the United States Court of Appeals. The United States District Court held that there was no Fifth Amendment taking in Petitioners' suit since the District Court would not exercise jurisdiction under 28 U.S.C. 1603(a)(5) and (c). The District Court erred by reaching that issue since the Court should have dismissed the case as to Defendant Iran on the grounds that the Executive possessed

the power to bar Petitioners' claim against Defendant Iran pursuant to the Algiers Agreement as held by this Court in *Dames & Moore* vs. *United States*, 49 U.S.L.W. 4969 (July 2, 1981). Therefore, the United States Court of Appeals for the District of Columbia would be forced to uphold the United States District Court's Order dismissing Petitioners' suit for this reason alone, since it is an established principle that Constitutional questions, i.e., the Fifth Amendment taking issue, should not be addressed when addressing them is unnecessary. Therefore Petitioners' contention that the United States District Court does in fact have jurisdiction over the State of Iran, et. al. under the Foreign Sovereign Immunities Act would never be adjudicated.

3. The instant case is an exceptional case both as to the facts and the law. The case presents a unique factual situation and raises issues of first impression, those issues being whether the jurisdiction of the United States District Courts does in fact extend to the United States Embassy grounds for purposes of the Foreign Sovereign Immunities Act, and whether Petitioners when suing in tort under the Foreign Sovereign Immunities Act are deprived of their Seventh Amendment right of trial by jury, and whether the United States by intervening was thus given greater powers than the original Defendant, Iran, since if there was in fact a taking, the only recourse under the present law would be in the Court of Claims, which does not allow for a jury. Since issues of fact in Petitioners' suit against Iran should have been determined by a jury, then the United States is bound by that, i.e., the issue of just compensation, a factual issue, should also be decided by a jury in the United States District Court using the procedures set forth in Rule 71A of the Federal Rules of Civil Procedure—not in the Court of Claims.

ARGUMENT

I.

THE WRIT OF MANDAMUS SHALL ISSUE TO COMPEL THE INFERIOR COURT TO EXERCISE ITS PRESCRIBED JURISDICTION THAT 28 U.S.C. SECTION 1605(a)(5) AND SECTION 1603(c) CLEARLY VESTS THE UNITED STATES DISTRICT COURTS WITH JURISDICTION OVER A FOREIGN STATE

In various decisions handed down by this Court regarding the Writ of Mandamus, the Court has held that the Writ "has traditionally been used in the Federal Courts only 'to confine an inferior Court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so,'" *Kerr* vs. *United States District Court*, 426 U.S. 394, 402 (1975), *Will* vs. *United States*, 389 U.S. 90. 95 (1967), *Roche* vs. *Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943). In the present case, United States District Court Judge Gesell clearly failed to exercise the prescribed jurisdiction of that Court when he held "that Section 1605 (a)(5) of the Foreign Sovereign Immunities Act does not apply . . . , the torts here did not occur in the United States. It is clear both in international law and under American law that an embassy is not considered part of the territory of the sending state," Judge Gesell's June 11, 1981 oral opinion (Pet. App. A., pp. infra). The opinion never mentions Section 1603(c) of the Foreign Sovereign Immunities Act, which is the crucial section. The only authority he cites (77, Comment A, Restatement (2nd) of the Law of Foreign Relations) is devoted to refuting the "extraterritorial" theory of diplomatic missions, the theory that such missions are literally and for all purposes part of the territory of the sending state rather than of the host state. Petitioners' argument that the Foreign Sovereign Immunities Act permits civil actions for torts committed in the United States Embassy does not in any way depend on this discredited "extraterritorial" theory. It depends, rather, on the fact that embassies, although outside the territory of the United States in the ordinary sense, are nonetheless within the jurisdiction of the United States, and, therefore, are within

the special definition of "United States" found in Section 1603(c). The Foreign Sovereign Immunities Act provides that a foreign state shall not be immune from the jurisdiction of the United States Courts with respect to tort claims in which money damages are sought or the injury, death, or damage occurs "in the United States . . .", 28 U.S.C. 1605(a)(5). For purposes of the Act, the "United States" is defined as "territory. . . subject to the jurisdiction of the United States," 28 U.S.C. Section 1603(c). The application of the Act need not be restricted to territory where the United States is sovereign since jurisdiction often extends beyond the territorial limits of the sovereignty. See, e.g., *United States* vs. *Cadena*, 585 F.2d 1252, 1257 (5th Cir., 1978) ("Jurisdictional territorial limits are not co-terminus.")

Although host nations ("receiving nations") exercise sovereignty over the territory upon which embassies are located, *Asylum Case*, (1950) I.C.J. 266, 274, they share jurisdiction over the embassy's territory with the nation represented by the embassy (the "sending nation").[2] The inviolability of diplomatic premises gives sending nations great freedom to control activity within its diplomatic missions, *see* Art. 22, *Vienna Convention on Diplomatic Relations*, April 18, 1969, 23 U.S.T. 3227, particularly since "(t)he immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State," id. at Art. 31(4). "No act of jurisdiction or administration of the receiving Government can take place within (the confines of an embassy) except by special permission of the envoys."

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[2] *Agee* v. *Muskie*, 629 F.2d 80, 111, 115-16 (D.C. Cir. 1980) (MacKinnon, J., dissenting) (United States has "concurrent jurisdiction" over the premises of a U.S. embassy), rev'd on other grounds *sub nom. Haig* v. *Agee*, 49 U.S.L.W. 4869 (June 29, 1981). In the *Agee* case, Judge Mackinnon also concluded that "the United States Embassy in Tehran, Iran, is within the special territorial jurisdiction of the United States" for the purposes of applying a criminal statute based on jurisdictional language similar to language used in the Foreign Sovereign Immunities Act. Surely civil jurisdiction should be construed broader than criminal jurisdiction.

Fatemi vs. *United States*, 192 A.2d 525, 527-8 (D.C. 1963) (quoting 1 Oppenheim, *International Law* Section 390 n. 5 (8th Ed. Lauterpacht 1955)). By prohibiting host nations from entering embassy grounds without permission, the principle of inviolability necessitates that sending states exercise at least some jurisdiction within their embassies.

The legitimacy of such concurrent jurisdiction over territory is well established in international law and practice. The World Court, on at least two occasions, has ruled that two nations may exercise concurrent jurisdiction even in territory where one of them is recognized as a sovereign. *The S.S. Lotus*, (1927) P.C.I.J. Ser. A., No. 10; *Asylum Case, supra*. Similarly, the Supreme Court has stated that the ability of Congress to legislate for a territory "does not depend upon sovereignty . . . over the territory." *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 381 (1948) (Fair Labor Standards Act covers employees at U.S. military bases in Bermuda).

Pursuant to international law, the United States has exercised jurisdiction over its embassies in several types of situations. In *United States* v. *Erdos*, 474 F.2d 157 (4th Cir.), *cert. denied*, 414 U.S. 876 (1973), the Fourth Circuit held that a person accused of committing murder in a U.S. embassy abroad may be prosecuted in a U.S. court. The Court stated that the "test (for jurisdiction), as to property within or without the United States, i(s) one of practical usage and dominion exercised over the embassy . . . by the United States government," *id.* at 159, and is not based solely on geography. The Defendant intervenor United States' Brief submitted to the United States Court of Appeals, Fourth Circuit, in the Erdos case is quite helpful. The issue of whether a United States Embassy is "subject to the jurisdiction of the United States" (28 U.S.C. 1603(c)) is argued most correctly by the

Defendant.[3] Similarly, a person accused of committing perjury in a United States Embassy may be prosecuted in United States courts. *United States* v. *Archer, supra.; United States* v. *Pizzarusso,* 388 F.2d 8 (2d Cir.), *cert. denied,* 392 U.S. 936 (1968). Moreover, it is clear that the United States may take jurisdiction over tort claims arising within the premises of a United States Embassy abroad. *Meredith* v. *United States,* 330 F.2d 9, 10 (9th Cir.), *cert. denied,* 379 U.S. 867 (1964) ("no one challenges the power of Congress to extend the remedy provided by the Federal Tort Claims Act to persons injured on premises occupied by this nation's foreign embassies and consulates").

The assertion by the United States of jurisdiction over its embassies abroad is mirrored by United States willingness to allow foreign nations to exercise jurisdiction over their diplomatic missions in the United States. By ratifying the Vienna Convention on Diplomatic Relations, the United States has recognized an obligation not to assume initial jurisdiction over activities which take place in foreign embassies located in the United States. *See* Art. 22, Vienna Convention, *supra.* The United States has taken the same

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[3]Page 27 of United States' Brief in *Erdos, supra.*,

"But the Court (in *United States* vs. *Archer,* 51 F. Supp. 708, S.D. Cal., 1943) also said:

> 'It seems evident, therefore that consular buildings in foreign countries, *being a part of the territory of the United States,** and under the control of the United States, the Congress has the right to punish as perjury any willful falsification occurring on the property of the consulate.' 51 F. Supp. at 711.

Most significant, the Court's language in *Archer, supra,* supports the Government's contention in the instant case that territorial jurisdiction does not mean actual political ownership of the land in a foreign country.

> 'And although it (the consulate) be not owned by the United States, *it is a part of the territory of the United States of America.** 51 F. Supp. at 709.

Despite the Defendant's efforts to distinguish *United States* v. *Archer, supra,* it is still the only case that specifically addresses itself in its two holdings to the question whether there can be United States territorial jurisdiction in its consulate in a foreign country. It answers affirmatively..."

*Emphasis Added.

position regarding the missions of nations which have not ratified the Convention. *See* 22 U.S.C. Section 254b. The United States has assumed jurisdiction over transactions occurring in foreign missions only in cases where it has been invited to do so by the nation whose mission is involved. *See Fatemi* v. *United States, supra*; 7 Whiteman, *Digest of International Law* 428-29 *citing Skantze* v. *United States*, 288 F.2d 416 (D.C. Cir. 1961).

The jurisdiction which the United States exercises over its embassies abroad and which it permits nations to exercise over their embassies in the United States is not based solely on the comon nationality between the nation exercising jurisdiction and the person subject to the exercise of jurisdiction. Otherwise, nations would be unable to control the activities of non-citizens present within the confines of their embassies.

The exercise by the United States of jurisdiction over activities of the United States Embassy in Iran is consistent with international law and practice. It was thus unnecessary for Congress to limit the scope of the Foreign Sovereign Immunities Act to the geographic boundaries of the United States in order to conform to the strictures of international law, and United States courts are not obligated to construe the Act narrowly on these grounds. *See Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) legislation should be interpreted where possible to be consistent with international law).

In determining Congressional intent concerning the applicability of the Foreign Sovereign Immunities Act, no analogy should be made to the Federal Tort Claims Act, which has been held to apply only within territory over which the United States is sovereign. *See United States* v. *Spelar*, 338 U.S. 217, 221 (1949); *Meredith* v. *United States*, 330 F.2d 9, 10-11 (9th Cir.), *cert. denied*, 379 U.S. 867 (1964). This limitation on the Federal Tort Claims Act is based on 28 U.S.C. Section 2680(k), which specifically renders that act inapplicable to torts "arising in a foreign country," and the intention of Congress reflected therein not to subject the United States Government to possible liability under foreign law. 338 U.S. at 220-21. The Foreign Sovereign Immunities

Act contains no similar statutory language, nor would its application to United States embassies abroad raise similar concerns regarding the liability of the United States Government. In addition, a person is held to be negligent if acting in violation of a legislative enactment. A criminal statute provides a standard for all reasonable members of the community. Defendants actions committed under circumstances so as to constitute a violation of a criminal statute are *per se* negilgent. *Prosser*, Section 36 at 190-92. Where the harm that a criminal statute was intended to forestall is inadequately addressed for whatever reason, the victim whose interests were not protected may bring a civil action to have those interests protected. Surely it follows that in such a civil action the Courts have jurisdiction if they did in a criminal action based on the same facts.[4]

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[4]See *Restatement (Second) of Torts* §286, Prosser, Section 36 at 190-92, *Texas & Pacific R. Co.* v. *Rigsby*, 241 U.S. 33 (1916); *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); and *Wyandotte Co.* v. *U.S.*, 389 U.S. 191 (1967) where the Court stated at Page 202, "In those cases we concluded that criminal liability was inadequate to ensure the full effectiveness of the statute which Congress had intended. Because the interest of the Plaintiffs in those cases fell within the class that the statute was intended to protect, and because the harm that had occurred was of the type that the statute was intended to forestall, we held that civil actions were proper. That conclusion was in accordance with a general rule of the law of torts. See Restatement (Second) of Torts §286."

In the instant case, Defendants Iran et. al. clearly violated 18 U.S.C. § 1201 (Sup. 1980) and 18 U.S.C. §112 (Sup. 1980).[5]

The Petitioners were, according to statutory definition, "internationally protected people:, i.e., they were all employees of the United States Government."

Although Congress did not expressly provide a private right of action, *it in no way excluded implication of such rights with respect to these criminal statutes.*

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[5]18 U.S.C. Section 1201 (Supp. 1980) provides in relevant part:

> "(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when:
>
> (4) the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section 1116(b) of this title, (which states (4) "Internationally protected person" means—(B) any other representative, officer, employee, or agent of the United States Government, a foreign government, or international organization who at the time and place concerned is entitled pursuant to international law to special protection against attack upon his person, freedom, or dignity, and any member of his family then forming part of his household.)

and 18 U.S.C., Section 112 (Supp. 1980), which provides:

> "(a) Whoever assaults, strikes, wounds, imprisons, or offers violence to a foreign official, official guest, or *internationally protected* person or makes any other violent attack upon the person or liberty of such person, or, if likely to endanger his person or liberty, makes a violent attack upon his official premises, private accommodation, or means of transport or attempts to commit any of the foregoing shall be fined not more than $5,000 or imprisoned not more than three years, or both. Whoever in the commission of any such act uses a deadly or dangerous weapon shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Further. the implication of a private federal remedy is consistent with the underlying purpose of the legislative scheme to deter terrorist acts against internationally-protected persons,

Therefore, Petitioners may maintain an action in tort against Defendants for violation of 18 U.S.C. Sections 1201 and 112.

Surely when Congress enacted the Foreign Sovereign Immunities Act, it did not foresee the takeover of a United States Embassy and the holding of its personnel as hostages. But Congress has spoken and shown a clear intent to provide a remedy for terrorist acts as it was expressed in 18 U.S.C. 1201 and 112. Congress has made the United States embassies *subject to the jurisdiction of the United States* in the Acts (See *United States* v. *Erdos, supra*). Therefore, Petitioners may maintain a private cause of action for a statutorily defined duty.

Section 1604 of the Foreign Sovereign Immunities Act, entitled, "Immunity of a foreign state from jurisdiction", states:

> "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter [28 USCS §§1605-07)."

Judge Gesell in his opinion dismissing Petitioners' case spoke of the Treaty of Amnity between the U.S. and Iran. Firstly, Petitioners submit that Iran would be estopped from using this treaty to claim immunity in this case at bar since by taking American diplomatic personnel hostage, they violated many sections of this treaty. Secondly, as Judge Gesell states, "there is no section of the treaty that the Court can find that would appear to waive immunity for this type of suit." In other words tort claims are never mentioned in the Treaty of Amnity. Therefore, the Foreign Soveriegn Immunities Act exceptions under 1605 would apply. Under Judge Gesell's reasoning, there would be no reason for the Foreign Sov-

ereign Immunities Act since he seems to feel that if a foreign nation did not waive its immunity, then it keeps it. If this were the case, of course, there would be no need for the Foreign Sovereign Immunities Act, but that is not the case. Congress felt that there were exceptions to the sovereign immunity of foreign states in U.S. Courts.

Clearly the United States District Court failed in this case to exercise its prescribed jurisdiction under the Foreign Sovereign Immunities Act when it held that it had no jurisdiction. The proper remedy for Petitioners is the Writ of Mandamus as the Court stated in *Ex parte Peru*, 318 U.S. 578, 582-583 (1943):

> (The) "jurisdiction of this Court to issue common law writs in aid of its appellate jurisdiction has been consistently sustained. The historic use of writs of prohibition and mandamus directed by an appellate to an inferior court has been to exert the revisory appellate power over the inferior court. The writs thus afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction, or of compelling it to exercise its authority when it is its duty to do so. Such has been the office of the writs when directed by this Court to district courts, both before the Judiciary Act of 1925 and since."

The Court cites *Ex parte United States*, 287 U.S. 241, (1932), *Maryland* vs. *Sober*, 270 U.S. 9 (1926); *Colorado* vs. *Symes*, 286 U.S. 510 (1932); *McCullough* vs. *Cosgrave*, 309 U.S. 634 (1940); *Ex parte Kawato*, 317 U.S. 69 (1942).

Petitioners, therefore, urge this Court to issue the Writ of Mandamus compelling Judge Gesell to amend his Order of June 11, 1981 and hold that the United States District Court for the District of Columbia does in fact have jurisdiction over the State of Iran in the instant case.

II

PLAINTIFFS HAVE NO OTHER PRACTICAL OR ADEQUATE MEANS TO OBTAIN THE RELIEF THEY DESIRE IN THIS CASE.

This Court stated in *Kerr* vs. *United States District Court*, 426 U.S. 394, at Page 403:

> "As a means of implementing the rule that the writ will issue only in extraordinary circumstances, we have set forth various conditions for its issuance. Among these are that the party seeking issuance of the writ have no other adequate means to obtain the relief he desires. *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943)."

Again the Court in *Helstoski* vs. *Meanor*, 442 U.S. 500 at Page 505 stated:

> "Almost 100 years ago, this Court explained: 'the general principle which governs proceedings by mandamus is, that whatever can be done without the employment of that extraordinary writ, may be done with it. It lies only where there is practically no other remedy.' Ex parte Rowland, 104 U.S. 604, 617 (1882)."

Also in *Helstoski, supra.*, at Page 506, the Court stated

> "Moreover, it is important to remember that issuance of the writ is in large part a matter of discretion with the Court to which the petition is addressed." *Kerr* vs. *United States District Court, supra*, 403 (1976).

In light of this Court's decision in the *Dames & Moore* vs. *United States, supra*, Petitioners argue that they have no other practical remedy than to petition this Court for a Writ of Mandamus since it is clear from the *Dames & Moore* decision that the President possessed the authority to terminate Petitioners' claim against Iran. Since it is an established principle that Constitutional questions should not be addressed when addressing them is unnecesary, it seems to Petitioners that if they pursued their case to the Court of Appeals, the Court of Appeals would be forced to decide the question of the dismissal on the Constitutional grounds already decided by

this Court in *Dames & Moore, supra*, and therefore never address the question of the District Court's jurisdiction under the Foreign Sovereign Immunities Act over Defendant Iran. Judge Gesell clearly should have dismissed the case against the State of Iran, then should have granted Petitioners' Motion to have the Defendant intervenor United States' Motion to Dismiss certified as a Declaration of Taking and set the case down for determination by a jury as to the question of just compensation for that taking. Judge Gesell should not have dismissed Petitioners' Counterclaim against Intervenor United States. Therefore, this Court should remand the case back to the District Court ordering it to hold a Jury trial on the issue of just compensation. Again, these questions would not be addressed by the Court of Appeals since they would be forced to uphold Judge Gesell's dismissal of the action as justified under the Executive Orders[6] and Treasury Regulations[7] issued by the United States to implement the Algiers Agreement.

Petitioners have no recourse at this point in the Court of Claims since Judge Gesell's Order does wrongly address the issue of jurisdiction under the Foreign Sovereign Immunities Act over Iran. The Court of Claims, of course, would be held to that ruling since the Court of Claims would have no authority to rule on the jurisdiction of the District Court. As a practical matter, Petitioners would be again forced to petition this Court for the very decision it now seeks as to jurisdiction under the Foreign Sovereign Immunities Act. (Note: In other words, if the ruling by Judge Gesell as to jurisdiction stands and Petitioners filed a claim against the United States in the Court of Claims, the Court of Claims would be forced to go along with Judge Gesell's ruling, and in that event, Petitioners would end up appealing that decision to the Supreme Court. Therefore, in the interest of judicial economy and

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[6]Executive Order 12283 of January 19, 1981, 46 Fed. Reg. 7927 (January 23, 1981).

[7]Iran Assets Control Reg., 46 Fed. Reg. 14,334 (February 26, 1981) (to be codified in 31 C.F.R. Section 535.216); Iranian Assets Control Regs., 31 C.F.R. Section 535.701.

justice, this Court should decide the issue of jurisdiction under the Foreign Sovereign Immunities Act over Iran.)

III

THE INSTANT CASE IS AN EXCEPTIONAL ONE WHICH PRESENTS IMPORTANT ISSUES OF FIRST IMPRESSION AND DEMANDS THAT THEY BE ADJUDICATED IN THE INTEREST OF JUSTICE

These issues being whether the jurisdiction of the United States District Courts does in fact extend to the United States Embassy grounds for the purposes of the Foreign Sovereign Immunities Act, whether the Petitioners suing in tort are deprived of their Seventh Amendment right to trial by jury, whether the United States as an intervenor must take the case as it finds it, and whether the action of the United States amounts to a condemnation.

This Court possesses power to issue the Writ of Mandamus in this exceptional case under the concept of "supervisory mandamus."[8]

The issue of jurisdiction of the United States District Courts under the Foreign Sovereign Immunities Act over United States Embassy grounds has been fully discussed above.

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[8]This concept is discussed in *Labuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957), *Schlagenhaus* v. *Holder*, 379 U.S. 104, *Will* v. *United States*, 389 U.S. 90, 95 (1967).

"Supervisory mandamus" is discussed in full in 86 Harvard Law Review 595 (1973) titled "Supervisory and Advisory Mandamus under the All Writs Act." Also see Judge Reinquist's dissent regarding the denial of certiorari in *Estell, Corrections Director, et. al.* vs. *Justice, United States District Judge, et. al.*, 4[illegible] U.S. 925 at Page 929 where Justice Reinquist states:

> "There is a substantial probability, therefore, that the issue here presented will escape review at any other time, and that mandamus is 'the only means of forestalling the intrusion of the Federal judiciary complained of by Petitioners. *Will* vs. *United States*, 389 U.S. 90, 95 (1967); *Maryland* vs. *Soper*, 270 U.S. 9 (1926)."

In the original case against Iran, Petitioners prayed for a jury trial since they were entitled to such under the Seventh Amendment. As the Foreign Immunities Act is now written, it only affords a non-jury trial.[9] Petitioners argue that this is unconstitutional in that a party suing in tort under this Act is in fact entitled to a trial by jury.

Petitioners in their Complaint against Iran state that they had been falsely imprisoned, etc. Throughout the duration of this litigation, Petitioners have never been given access to the United States Courts as is their right. The United States entered the case first with Suggestions of Interest, thus, staying the case. Then the United States made a foreign policy executive agreement[10] with the State of Iran in which consideration was given on both sides. One item of consideration was that Petitioners give up their pending suits against their imprisoners. This consideration was used as a bargaining chip in furtherance of United States foreign policy. Petitioners contend at this point that the United States did not have the right to use their claims as a bargaining chip without paying just compensation.

The United States intervened and by doing so was under the obligation to take the case as it found it. In reality, the United States agreed to stand in Iran's place as intervening Defendant.[11] Since Petitioners were entitled to have this case heard before a jury, then it follows that they still possess this right because that right existed at the time the United States intervened, and the intervenor possesses the same rights and liabilities as the original parties.[12] Therefore, Petitioners are

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[9]28 U.S.C. §1330.

[10]Declaration of the Democratic and Popular Republic of Algeria, General Principles, *supra.*

[11]This action could be analogized to that of an insurance company agreeing to stand in the place of its insured in a tort claim. That is what in fact happened here. There was no offer by the United States to settle Petitioners' claim or to assist them in settling their claims.

[12]See *Piccard* v. *Sperry Corporation, infra., Godfrey L. Cabot, Inc.* v. *Einney and Smith Co., infra.*, and *Vincent* v. *Washington Gas Co., infra.*

requesting this Court to remand the case to the District Court and have the case tried as if it were against Iran with the United States standing in Iran's place. When the United States intervened, they should have intervened to protect their interests only, their interests being that the case should have been dismissed because the President had the authority to have it dismissed as part of the agreement with Iran, but the United States in their Motion to Dismiss raised the question of jurisdiction and filed an Answer to the original Complaint. When the United States did this, they accepted the full liability that Iran was subject to. Therefore, the United States should be held liable subject to the same rights and liabilities as the State of Iran.[13] In the alternative, the Court below should have treated the United States' Motion to Dismiss and filing of an Answer as in fact a Declaration of Taking as the United States would file under Rule 71A of the Federal Rules of Civil Procedure. Through their actions, the United States condemned the property rights of Petitioners and took their property for the public use.[14]

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[13]The liability of the State of Iran and the amount of damages should have been determined by a jury as trier of fact.

[14]It must be emphasized that of all of the Petitioners, only one, Steven Lauterbach, was freed because of the agreement with Iran. The other Petitioners were either released or escaped some time before the January 19th agreement (Declaration of the Democratic and Popular Republic of Algeria, General Principles, *supra*) that led to the freeing of the hostages. Petitioner Lauterbach would argue that his property rights are not subject to a contract, i.e., the Executive Agreement, that he had no part in making.

A. PETITIONERS' JURY RIGHTS

As stated above, the Petitioners contend they were entitled to a jury trial in the underlying cause of action against the State of Iran.[15]

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[15]Petitioners rely on the Seventh Amendment of the Constitution, *Curtis* vs. *Loether, et. al.*, 415 U.S. 189, and *Icenogle* vs. *Olympic Airways*, S.A. 82 Federal Rules Decisions 36. The *Icenogle* case dealt with wrongful death actions brought against a foreign owned air carrier in the United States District Court for the District of Columbia under the Foreign Sovereign Immunities Act of 1976. Judge Oberdorfer decided the question of Plaintiffs right to a jury trial on issues other than the Seventh Amendment, but he did most eloquently speak to the issue at Page 40:

> "A suit for wrongful death is a legal claim, entitled to a jury trial under the Seventh Amendment. Compare *Curtis* v. *Loether*, 415 U.S. 189, 193-94, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974) and *Moragne* v. *United States*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). It may be that in 1791 the doctrine of absolute sovereign immunity might have barred suit against a foreign sovereign acting in a commercial capacity, see, e.g., *Berizzi Bros. Co.* v. *S.S. Pesaro*, 271 U.S. 562, 46 S.Ct. 611, 70 L.Ed. 1088 (1926), even if the sovereign acted through a corporate entity, see *Oliver American Trading Co.* v. *Mexico*, 5 F.2d 65 (2d Cir. 1924). It is nevertheless an open question whether, having removed the foreign sovereign's immunity from suit under the circumstances presented here, Congress may constitutionally provide that legal claims are not to be tried to a jury. While Congress may not be obliged to allow suit in federal court against a foreign sovereign at all *once Congress has decided to give Federal courts jurisdiction to hear such suits it may not restrict the exercise of that jurisdiction in an unconstitutional manner.** See Anglo-American Provision Company v. Davis Provision Company, No. 1, 191 U.S. 373, 274-75, 24 S.Ct. 92, 48 L.Ed. 225 (1903) and Testa v. Katt, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947); see also Angel v. Bullington, 330 I.S. 183, 188 67 S.Ct. 657, 91 L.Ed. 832 (1947). But compare C. Wright E. Cooper and A. Miller, 14 Federal Practice and Procedure Sections 3662 (1977 Supp.), 3654; U.S. v. Sherwood, 312 U.S. 584, 61 S.Ct. 767, 85 L.Ed. 1058 (1941). The statutory scheme adopted by Congress addressing federal jurisdiction of foreign sovereigns must, as in any other area, conform to the Constitution. See also McKnett v. St. Louis & S.F. Ry. Co., 292, U.S. 230, 233, 54 S.Ct. 690, 78 L.Ed. 1227 (1934). Accordingly, there is a serious question whether Congress, having abolished a foreign sovereign's immunity under certain conditions, may constitutionally bar trial of legal (as distinguished from equity and admiralty) actions against the

This Court in *Curtis* vs. *Loether, et. al., supra.*, addressed the issue of the Seventh Amendment right to a jury trial. In the *Curtis* case, the facts dealt with Section 812 of the Civil rights Act of 1968, 42 U.S.C. Section 3612, which authorized private Plaintiffs to bring civil actions to redress violations of their civil rights under Title VIII. In *Curtis*, the petitioner wrongly argued that the Seventh Amendment is inapplicable to new causes of action created by Congressional enactment and the Court disagreed. The Seventh Amendment applies to the instant case where the cause of action is a common law cause of action which sounds basically in tort. The Congress, when it passed the Foreign Sovereign Immunities Act, abolished a foreign sovereign's immunity under certain circumstances such as are presented in Petitioners' case.[16]

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foreign sovereign. Absent a clearer directive from Congress than that provided here the Court will not choose a construction of the Immunities Act that would bring into serious question its constitutionality under the Seventh Amendment. See Lorrillard v. Pons, supra.

. . . The right to a jury trial in suits at common law guaranteed by the Seventh Amendment, in contrast, has been described as "the very palladium of free government". Galloway v. United States, 319 U.S. 372, 398, 63 S.Ct. 1077, 1090-91, 87 L.Ed. 1458 (1943) (Black, J., dissenting). It is a "right so fundamental and sacred to the citizen . . . [that it] should be jealously guarded by the courts". Jacob v. New York, 315 U.S. 752, 753, 62 S.Ct. 854, 86 L.Ed. 1166 (1942)."

*Emphasis added.

[16]In the *Curtis* case, *supra*, the Court states:

"The Seventh Amendment provides that '[in] suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' Although the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time." (Pages 192, 193).

". . . The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." (Page 194).

If this Court feels that the United States did not in fact indemnify Iran when it made an Executive Agreement with that state and, therefore, does not accept the case as it found it, Petitioners would argue that at least the taking in this case falls under Rule 71A, which governs condemnation of real and *personal property* (emphasis added) under the power of eminent domain. This Rule sets out the procedure which the United States should have followed in Petitioners' case. The United States did follow the procedure to the extent that the United States' Motion to Dismiss and Answer was in fact a Declaration of Taking. In Section (h) of Rule 71A of the Federal Rules of Civil Procedure, it is stated who should determine the issue of just compensation. In the instant case, the issue of just compensation clearly should be heard by a jury.[17]

Thus, when the United States condemns property, as it did in the instant case, a trial as to the issue of just compensation by jury is infinitely superior to any other method. If Petitioners were forced to bring their action in the Court of

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". . . But when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action of law." (Page 195).

". . . More fundamentally, however, these considerations are insufficient to overcome the clear command of the Seventh Amendment." (Page 198).

[17]In 1968 Congress abolished the TVA Commission when it passed Public Law 80-536. It is helpful to review the Senate debates on this law especially when Senator Baker speaking for the Senate Committee on Public Works stated:

"I believe that in the case of the small landowners, regardless of how many properties are condemned simultaneously and for the same purpose, and in the case of uncomplicated litigation and in the case of establishing values in the ordinary course of events and in the vast majority of condemnation cases, resort to trial by jury is infinitely superior to the less rigid requirements of resort to trial by commission." (113 Cong Rec 18939, December 15, 1967).

Claims, they would be forced to do so under the Tucker Act, 28 U.S.C. 1491, thus depriving them of a jury trial on the issue of just compensation.[18]

Of course, Rule 71A governs the procedure for the condemnation of real and personal property.[19]

When the United States entered into the Algiers Agreement, it agreed to terminate all hostage claims against Iran and prevent the hostages or their families from suing Iran

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This view was also stated by Senator Cooper when he spoke:

"I think it important to remember, and to make clear at this point, that Rule 71A is primarily an assurance of the right of trial by jury when requested by either party, unless the issue is so involved that appointment of a commission is required by the court. I believe that what may have happened in some courts of the land—and it may be a result of the practice which has been followed in the Tennessee Valley area—is that this premise, this fundamental principle, has been ignored, in fact, the priority reversed. Priority appears to have been given to the appointment of commissioners and the private citizen's request for trial by jury recognized only in a few cases by some courts.

I hope that this colloquy, the debates in House, and, in fact, the letter of the law itself—Rule 71A and its background—will be impressed upon the courts in the Tennessee Valley Authority area and other courts. I hope it is clear that the substantive principle is that the right of trial by jury shall be given to either party, unless the situation is of such a complex nature that commissioners are required." (I.D. at 18940).

[18]The United States Court of Appeal for the Fourth Circuit in 1973 in the case of *United States* vs. *21.54 Acres of Land, Marshall City, West Virginia*, 491 F.2d 301 (1973) held that in an inverse condemnation that landowner if required to claim under the Tucker Act would be deprived of a jury trial on the issue of just compensation thus reversing the District Court.

[19]Petitioners' claim against Iran is a property right. E.G., *United States* v. *Hubbell*, 323 F.2d 197, 200 (5th Cir. 1963) (a tort claim is property); *Bensinger* v. *Davidson*, 147 F. Supp. 240, 245 (S.D. Cal. 1956) (Causes of action for tort met California statutory definition of property); *Gochenour* v. *George & Francis Ball Foundation*, 35 F. Supp. 508, 514 (D. Ind.) ('a 'cause of action' is . . . a property right"), aff'd, 117 F.2d 259 (7th Cir.), *cert. denied*, 313 U.S. 566 (1941); cf. *Gray* v. *United States*, 21 Ct. Cl. 340, 393 (1886). *See generally Randall* v. *Nakashima & Co.*, 542 F.2nd 270, 275 (5th Cir. 1976) (contingent interests may constitute property).

anywhere in the world, either in the Courts of this country, in the international courts, or in the Courts of any other country.[20]

These actions by the United States are in fact actions of condemnation under the United States' power of eminent domain. Therefore, the procedures spelled out in 71A should apply.[21]

B. INTERVENTION BY THE UNITED STATES IN PETITIONERS' SUIT AGAINST IRAN

It is an established principle that an intervenor takes the case as he finds it and is for all intents and purposes an original party. As stated in *Piccard* v. *Sperry Corporation*, 36 F. Supp. 1006 (1941).[22] This principle governs intervention by

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[20]Declaration of the Government of Democratic and Popular Republic of Algeria, General Principles, Paragraph 11 (January 19, 1981), reprinted in 20 Int'l Legal Materials 244, 277 (1981). This was implemented by Executive Order 12283 of January 19, 1981, 46 Fed. Reg. 7927 (January 23, 1981), and by Treasury Regulations, Iran Assets Control Regs., 46 Fed. Reg. 14.334 (February 26, 1981) (to be codified in 31 C.F.R. Section 535.216).

[21]Note Iranian Assets Control Regs., 31 C.F.R. Section 535.701 subject a hostage or his family members to a fine of $50,000 and a prison term of ten years if he filed suit against Iran in any Court anywhere in the world.

[22]The Court stated on Page 1009: "The intervenors seek voluntarily to come into this Court as party Plaintiffs, and they should not stand in any better position than the original Plaintiffs. . . "
Also in *Godfrey L. Cabot, Inc.* v. *Einney and Smith Co.*, 46 F. Supp. 346, the District Court at Page 347 stated: "Intervention presupposes dependency of a suit in a Court of competent jurisdiction, and one who voluntarily becomes a party-thereto, impliedly, as if not expressly, accepts the proceedings as he finds them at the time of the intervention; the intervenor is, for all intents and purposes, an original party. *Marsh* v. *United States*, 4 CIR., 97th F.2d 327; *State of Kansas* v. *Occidental Life Insurance Co., et. al.*, 10 CIR., 95 F.2d 935; *General Motors Corporation* v. *Blackmore*, 6 CIR., 53 F.2d 725; *Commercial Electric Supply Co.* v. *Curtis, et. al.*, 8 CIR., 288 F. 657; *Prichard* v. *Sperry Corporation, et. al, supra*.."

the United States.[23] It would seem that the United States should not possess greater rights than other intervenors.

Mr. Justice Reinquist who was joined by the Chief Justice and Mr. Justice Powell in dissenting on the denial of certiorari in the *Estelle, Corrections Director, et. al.* v. *Justice, U.S. District Court, et. al.*, 426 U.S. 925 (1976), stated:

> "Despite the familiar Rule that an intervenor take the case as he finds it, respondent granted not only the Motion of the United States to intervene, but also that seeking to ask as parties Defendant the Texas Board of Corrections, and the members of that Board as individuals. In addition, the complaint in intervention of the United States sought relief which went far beyond that sought by the inmates."

When the United States intervened in Petitioners' case against the State of Iran, it in fact intervened in behalf of Iran thus upholding its agreement with Iran to terminate the Petitioners' suit thus indemnifying Iran. Petitioners are entitled to have their claim heard before a jury against the United States as Defendant intervenor as if it were in fact the State of Iran. It should be emphasized that the only reason the United States intervened was to uphold its agreement with Iran, which is identical to the practice of an insurance company defending its insured in a tort claim. This is not a case where the United States intervened to protect an interest it inherently possessed. The interests it sought to protect were those of Iran. In the other claims against the State of Iran, those held by commercial interests, the United States settled those when it agreed with Iran to set up the International Claims Tribunal. There are several distinguishing factors between those claims and Petitioners', the first being that in the other claims, claimants had attached property of Iran and were only able to do this through an action of the United

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[23] See Vincent v. Washington Gas Co., 321 U.S. 489 at Page 498 where the Court states: "One of the most usual procedural rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceedings. . ."

States, i.e., the freezing of the Iranian assets by President Carter. But for that action, the claimants would have been in the same position as Petitioners.[24] The United States again assisted the commercial claimants when it forced Iran as part of the Algiers Agreement, *supra*, to place in escrow a certain amount of money to be paid to the commercial claimants when they proved their claim in the International Claims Tribunal. In other words, the other claimants from the very beginning were greatly helped by the United States,[25] (1) when it froze the Iranian assets on November 14, 1979, and (2) when it forced the Iranians to put a portion of those assets in escrow for the purpose of settling the commercial claims. The Petitioners never asked nor did they seek any assistance from the United States in settling their claim against Iran.[26] Petitioners' claim is also distinguished from others in that the other claims were suspended—not terminated—as Petitioners were. Therefore, the United States in fact indemnified Iran and should suffer the consequences.

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[24]On December 17, 1980, Petitioners moved the United States District Court to grant them permission to file attachments. This was denied.

[25]In the long line of cases relied on by the U.S. when it argued *Dames & Moore* v. *U.S.*, *supra.*, claimants in those cases had no enforceable claim against a foreign sovereign without some action by the U.S., be it reconquering territory lost in war (the World War II case) or the seizing by the U.S. Navy of vessels such as the Schooner Peggy.

[26]Petitioners only wanted a judgment against Iran. Petitioners could have collected on such a judgment on their own with no help from the United States.

CONCLUSION

Petitioners pray this Court to issue the Writ of Mandamus ordering the United States District Court for the District of Columbia to exercise its prescribed jurisdiction and hold a jury trial with the United States as indemnifier of Iran.

In the alternative, to order the United States District Court for the District of Columbia to grant Petitioners' Motion to have United States' Motion to Dismiss and Answer certified as a Declaration of Taking and hold a jury trial to determine the issue of just compensation.

In the alternative, to order the United States District Court of the District of Columbia to vacate that part of its Order to dismiss addressing the taking issue thus opening the doors to the Court of Claims for Petitioners.

Respectfully submitted,

JOHN P. COALE
305 4th Street, N.E.
Washington, D.C. 20002

January 21, 1982

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Writ of Mandamus to the District Court of the District of Columbia was mailed, postage prepaid, to Thomas G. Shack, Esq., Christine Cook Nettesheim, Esq., John B. Beaty, Esq., Abourezk, Shack & Mendenhall, P.C., 1129 Twenthieth St., N.E., Suite 500, Washington, D.C. 20036, Attorneys for the Islamic Republic of Iran and Ayatollah Khomeini, and to Mr. Robert E. Kopp and Mr. Michael F. Hertz, Department of Justice, Civil Division, Room 3617, Appellate Staff, Washington, D.C. 20530, on the _____ day of _____, 19____.

JOHN P. COALE

Appendix

APPENDIX

THE ORAL OPINION BY THE HONORABLE GERHARD A. GESELL, UNITED STATES DISTRICT JUDGE, IN THE CONSOLIDATED CASES OF WESTLEY WILLIAMS, ET. AL. VS. STATE OF IRAN, ET. AL., CIVIL ACTION NO. 79-3295, AND STEVEN M. LAUTERBACH, ET. AL. VS. STATE OF IRAN, ET. AL., CIVIL ACTION NO. 81-350, ON JUNE 11, 1981.

THE COURT: The Court is prepared to give its ruling orally today. I do so because not only have the issues been well briefed and well argued but the Court is conscious of the appropriateness at this time of resolving as many matters that impinge on the Accords as possible within the limits that were set by the President.

Preliminarily, of course, it is not the Court's function to pass on the wisdom of the Accords as such or to deal with the quasi-political matters that counsel for Plaintiffs quite properly brings to the Court's attention but which are really not matters that fall within the concerns of this Court that it can note, as a judge, putting aside whatever one's personal feelings might be about some of the underlying circumstances.

At the threshold of this motion to dismiss, it is, of course, necessary to find some jurisdiction for these tort actions.

Counsel properly relies on 1605(a)(5) of the Foreign Sovereign Immunities Act but the Court believes that this provision does not apply.

The torts here did not occur in the United States. It is clear both in international law and under American law that an embassy is not considered part of the territory of the sending state.

I see no reason to review the Conventions and decisions and legislative material that have been cited on this subject to the Court. I would, however, refer in particular to Section 77, Comment A in the Second Restatement of the Law of Foreign

Relations, which is specifically in point on this subject and represents the distilled view of scholars and judges who have struggled with the matter over a substantial period of time.

There is another difficulty, however, and that is that I cannot read 1606(a)(5) standing alone. I must take into account the Treaty of Amity in existence between Iran and the United States.

That treaty, entered into long before these difficulties, was never abrogated. It has never been cancelled. It remains in effect. If the grant under the treaty is broader than the grant of immunity under the Foreign Sovereign Immunities Act, the broader grant of immunity to Iran must prevail as a matter of law.

It is clear that the waiver of immunity under the Treaty of Amity, Article XI, I believe it is, clearly refers only to commercial or business enterprises; and there is no section of the treaty that the Court can find that would appear to waive immunity for this type of suit.

This analysis, I think, puts into perspective the other issues that have been raised and brought forward here by the parties.

There is, it seems to the Court, no taking involved. There is no property interest in this chose of action that is cognizable as a taking under the taking clause of the Constitution.

I see no likelihood of success under the authorities that there would be for emotional or other reasons a holding by a court that this unfortunate series of events affecting the lives of the hostages in any fashion represented a taking.

As far as the Accords are concerned, I believe the law is clear that the President, under Article II and under the IEEPA statute, and the other authorities cited, has authority to settle claims; and that that authority to settle claims includes the right to expunge a claim, erase a claim, reduce a claim or modify a claim in any way.

I think there is no question, counsel for the Plaintiffs is right that the interests of the hostages was one of the matters

of primary concern in the bargaining that took place.

Perhaps one would call it a bargaining chip. It had always been the Court's impression and it is still the Court's impression that the primary interest of the United States was to save the lives of the hostages, which was accomplished.

It may well be that the cost of saving those lives was to deny them monetary relief and vindication, which they seek by these suits. Whatever may be the facts with respect to that, it seems to the Court that there was a rational basis for excluding these claims, not only for the reason that I have just indicated, but for the additional fact that there has been, at least by the then President of the United States, President Carter, a definite determination and interest in providing an alternative forum, which he did, by creating the Commission on Hostage Compensation in January '81 by Executive Order 12285.

Accordingly, I feel that I have, as far as this Court is concerned, no alternative but to dismiss the cases before me and the counterclaim.

I will enter a simple order to that effect later today, relying on these remarks from the bench as a statement of the Court's reasons.

I thank counsel on both sides for everything they have sought to do in this matter.

I will not comment any further with respect to the case.

Thank you.

Opposition

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Supreme Court, U.S.
FILED
MAR 25 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1483

In the Supreme Court of the United States

OCTOBER TERM, 1981

IN RE WESTLEY WILLIAMS, ET AL., PETITIONERS

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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p. 612 (Apr. 7, 1980) 1
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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1483

IN RE WESTLEY WILLIAMS, ET AL., PETITIONERS

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. On November 4, 1979, Iranian militants seized the United States Embassy in Teheran and held hostage more than 50 American citizens. On January 19, 1981, after a prolonged crisis,[1] the United States and Iran peacefully resolved many of their outstanding disputes, reaching agreement on the release of the hostages, the settlement of claims, and return of Iranian property in the United States. See *Dames & Moore* v. *Regan*, No. 80-2078 (July 2, 1981), slip op. 4-9.

The claims of American nationals against Iran were settled on varying terms. In order to secure the return of the hostages, their claims and those of their families were relinquished in exchange for their safe release; the United States

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[1]See, *e.g.*, Exec. Order No. 12,170, 44 Fed. Reg. 65729 (1979) (declaring a national emergency and blocking Iranian assets); 16 Weekly Comp. of Pres. Doc. 612 (Apr. 7, 1980) (breaking diplomatic relations); 16 Weekly Comp. of Pres. Doc. 612 & 716 (Apr. 7 & 17, 1980) (trade sanctions against Iran); 16 Weekly Comp. of Pres. Doc. 771 & 772 (Apr. 25, 1980) (military rescue mission).

agreed to bar the prosecution against Iran of any claim of the United States or a United States national arising out of the seizure of the hostages. An implementing executive order and regulations prohibited persons subject to the jurisdiction of the United States from prosecuting any claim against Iran arising from the seizure of the hostages and their detention. Any proceedings involving such a claim were ordered to be terminated, and any judicial orders issued in such proceedings were not to be enforced. Exec. Order No. 12,283, 46 Fed. Reg. 7927 (1981); 31 C.F.R. 535.216(a), (c), and (d), 46 Fed. Reg. 14334 (1981).

Petitioners, former hostages and their families, filed complaints against Iran in the United States District Court for the District of Columbia. They sought damages for injuries arising out of the seizure of the Embassy and the hostages' detention. Petitioners alleged, among other things, that defendant Iran and its agents and officials deprived the hostages of their constitutional rights, illegally seized them and held them hostage, assaulted them and inflicted emotional distress upon them. Petitioners asserted that the district court had jurisdiction of these claims under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.* The FSIA grants a foreign state immunity from the jurisdiction of United States courts (28 U.S.C. 1604), but provides an exception for personal injuries or loss of property occurring in the United States by the tortious act or omission of the foreign state (28 U.S.C. 1605(a)(5); see 28 U.S.C. 1603(c)). Petitioners asserted that this exception applied to their claims because some of the alleged wrongs occurred in an American embassy.

The United States intervened and moved to dismiss on the basis of the agreement with Iran. The district court granted the motion, concluding that "the President * * * has authority to settle claims; and * * * that authority to settle claims includes the right to expunge a claim, erase a

claim, reduce a claim or modify a claim in any way" (Pet. App. 2). The district court also concluded that the FSIA did not confer jurisdiction over petitioners' claim because "[i]t is clear both in international law and under American law that an embassy is not considered part of the territory of the sending state" (*id.* at 1). The district court ruled in addition that the United States had not taken petitioners' property (*id.* at 2).

2. Petitioners seek a writ of mandamus to compel the district court to find that the FSIA confers jurisdiction over their claim against Iran. Petitioners appear to concede (Pet. 14-15) that under *Dames & Moore* v. *Regan, supra*, the executive order and regulations implementing the agreement with Iran bar their claims, but they hope to show in some future proceeding that the executive order and regulations effected a taking of those claims for which they are entitled to compensation. Petitioners apparently believe that the court of appeals will affirm the district court's decision on the basis of the executive order and the regulations, and that the court of appeals will not reach the district court's holding that under the FSIA it had no jurisdiction over those claims in any event. Petitioners fear that they will then be collaterally estopped from contesting this construction of the FSIA, which of course will seriously impair, if not defeat, their assertion that the executive order and regulations took valuable claims on which they might have recovered. See Pet. 14-15.

As petitioners appear to recognize (*e.g.*, Pet. 14), however, a writ of mandamus issued by this Court is a "drastic and extraordinary" remedy. *Ex parte Fahey*, 332 U.S. 258, 259 (1947). A petition for a writ of mandamus must "set forth with particularity why the relief sought is not available in any other court." Sup. Ct. R. 27.2.(a). A petition for a writ of mandamus to a district court in connection with a case appealable to a court of appeals " 'ordinarily must be

made to the intermediate appellate court' "and may be filed directly in this Court only in " 'exceptional cases' " in which " 'it is peculiarly appropriate that such action by this Court should be taken. * * *' " *Ex parte Peru*, 318 U.S. 578, 585 (1943), quoting *Ex parte United States*, 287 U.S. 241, 249 (1932). In no event is mandamus to be used as a substitute for appeal. See, *e.g.*, *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655, 661 (1978) (plurality opinion); *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382-384 (1953); *Ex parte Fahey, supra*, 332 U.S. at 260. See also *Kerr* v. *United States District Court*, 426 U.S. 394, 402-403 (1976). Petitioners' allegations fall far short of satisfying these standards.

Petitioners are free to urge the court of appeals to overturn the district court's construction of the FSIA. In fact, this issue—as well as the question whether the President had authority to settle the claims of the hostages—is pending before the District of Columbia Circuit in another case, *Persinger* v. *Islamic Republic of Iran*, No. 81-2003 (filed Oct. 7, 1981).[2] Should the court of appeals rule against petitioners, they may then seek certiorari in this Court. If the court of appeals pretermits the FSIA issue, petitioners will have the opportunity to argue that they are not bound by the district court's FSIA ruling in future proceedings. Petitioners' concern about collateral estoppel can be presented to the court of appeals, to the forum that considers their taking claim, and ultimately, if necessary, to this Court—*after* the normal appellate proceedings are completed.

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[2]Oral argument in this case is scheduled for April 26, 1982.

It is therefore respectfully submitted that the petition for a writ of mandamus should be denied.

REX E. LEE
Solicitor General

MARCH 1982

DOJ-1982-03

Amicus Brief

MOTION FILED
MAR 12 1982

No. 81-1483

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

IN RE WESTLEY WILLIAMS, *et al.*,

Petitioners.

On Petition for a Writ of Mandamus to the District Court for the District of Columbia

MOTION OF FLAG, INC., FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF

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IN THE

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OCTOBER TERM, 1981

No. 81-1483

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Petitioners.

On Petition for a Writ of Mandamus to the District Court for the District of Columbia

---

MOTION OF FLAG, INC., FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

FLAG, Inc., hereby moves for leave to file a brief *amicus curiae*, pursuant to Rule 36, in order to apprise the Court of the interest of its members, the former American hostages in Iran and their families, in certain of the issues before the Court in this case. The proposed *amicus* brief is attached hereto. The United States has consented in writing to the filing. Petitioners have withheld their consent; the Iranian parties were not contacted in view of their refusal to give such consents in the past.

FLAG's interest in this petition for a writ of mandamus is that it presents certain issues of concern to its membership, particularly the claimed sovereign immunity of Iran, in a context which is premature and which does not favor full briefing of the issue.

FLAG's concern stems from its position, previously stated in an *amicus* brief filed with this Court in *Dames & Moore* v. *Regan*, ____ U.S. ____ , 101 S.Ct. 2972 (1981), in hearings

before the President's Commission on Hostage Compensation, and in *amicus* briefs before other courts (see p.5 n.2 of the proposed *amicus* brief), that the United States' extinguishment of hostage causes of action against Iran constituted a taking of property or property rights for which compensation is due under the fifth amendment.

FLAG believes that the only proper forum for the determination of the validity and value of hostage taking claims is, in the first instance, the Court of Claims. Since petitioners in this proceeding have chosen to pursue their claims elsewhere, and this choice inevitably affects the manner in which they present issues of fact and law which are critical to the interests of those of FLAG's members who may wish to bring taking claims in the Court of Claims, FLAG believes that neither petitioners nor respondents adequately represent its views on these matters. In particular, although FLAG agrees with petitioners that the Foreign Sovereign Immunities Act would not (absent the extinguishment of hostage claims by the United States) insulate Iran from tort claims based on events occurring on the premises of the United States Embassy in Tehran, Iran, FLAG does not believe that the question is properly presented for review in the context of this petition for a writ of mandamus.

FLAG does not know what position the United States or any other respondent will take on issues of concern to FLAG. However, the United States is in a potential adversarial posture to those of FLAG's members who may wish to bring taking claims against the United States in the Court of Claims, and therefore FLAG does not expect its views to be congruent with those of the United States or of other respondents.

Accordingly, FLAG respectfully requests permission to file a brief *amicus curiae*.

Respectfully submitted,

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March 12, 1982

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IN THE

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Petitioners.

On Petition for a Writ of Mandamus to the District Court for the District of Columbia

---

BRIEF OF *AMICUS CURIAE* FLAG, INC.

FLAG, Inc., files this *amicus* brief to apprise the Court of the interest of its members, the former American hostages in Iran and their families, in certain of the issues before the Court in this petition for a writ of mandamus.

INTEREST OF THE *AMICUS CURIAE*

FLAG, Inc., is a nonprofit organization which was incorporated in the District of Columbia on May 9, 1980, in succession to Family Liaison Action Group, an unincorporated association formed soon after the seizure of American hostages in Iran on November 4, 1979. FLAG's original members were the wives and parents of the American hostages then held in Iran. Since the hostage release on January 20, 1981, the former hostages have also become members.

FLAG's purposes, as defined in its Articles of Incorporation, are "to educate the . . . public about the international crisis caused by the taking of hostages . . .; to assist in resolving that crisis . . .; to secure the human rights of the hostages . . .; to provide for the assimilation of the hostages into a normal life

with dignity and honor . . .;" and to provide channels of communication among its members, to the news media, to the government, and to the American public.

FLAG's position is that the former hostages and their families had good and valuable causes of action against the government of Iran arising out of the hostage seizure and detention which have been taken from them by the United States. This taking was achieved by a series of Executive Orders and implementing Treasury Regulations. FLAG believes and asserts that compensation for the taking of its members' causes of action is constitutionally required, and that the proper forum for determination of issues related to the former hostages' taking claims against the United States is the Court of Claims.

A number of the issues raised by petitioners in this petition for a writ of mandamus have the potential, if they are considered and disposed of prematurely in the present procedural posture of this case, of adversely affecting the interests of those of FLAG's members who may wish to bring taking claims against the United States in the only proper forum for such claims, the Court of Claims.

FLAG agrees with petitioners' position that the Foreign Sovereign Immunities Act does not bar claims against Iran arising from tortious acts committed on the premises of the United States Embassy in Tehran, and FLAG agrees that Judge Gesell, in his oral opinion, was incorrect in asserting as one ground for dismissal of plaintiffs' claims against Iran the protection afforded Iran by the Foreign Sovereign Immunities Act. However, FLAG does not believe that this question is properly presented for review in the procedural context of a petition for a writ of mandamus, since Judge Gesell's decision is fully reviewable on appeal to the United States Court of Appeals for the District of Columbia Circuit.

Nothing prevents petitioners from challenging one or both grounds on which Judge Gesell's dismissal order rested. Indeed, FLAG has submitted an *amicus* brief to the District of Columbia Circuit in a case involving hostage claims substantially identical to this one in which FLAG urged the court explicitly to repudiate that portion of a district court judgment which held that the Foreign Sovereign Immunities Act would have insulated Iran from liability in American courts for torts committed on the premises of the United States Embassy in Tehran even if the United States had not extinguished the hostage causes of action. See *Persinger* v. *Islamic Republic of Iran*, Civ. No. 81-0230 (D.D.C.) (August 21, 1981), *appeal pending*, Civ. No. 81-2003 (D.C. Cir., docketed Sept. 14, 1981).

Accordingly, FLAG submits this brief to urge that the Court base any dismissal of this petition for a writ of mandamus on the ground that alternate relief is readily available in the form of the normal appellate process. FLAG urges that the Court refrain from addressing issues of substantive importance to all of the former hostages who may wish to bring taking actions against the United States in the Court of Claims in a procedural context such as this, which does not favor a full briefing on the merits of issues of critical importance to potential taking claims.

SUMMARY OF ARGUMENT

There is no need for the Court to reach the question whether the Foreign Sovereign Immunities Act would have barred hostage causes of action against Iran prior to the extinguishment of those causes of action by the United States. The issue is fully reviewable on appeal to the District of Columbia Circuit. Accordingly, the Court should dispose of the petition without entering upon the merits of that issue.

ARGUMENT

The Question Whether Iran Is Insulated from Suits by the Former Hostages and Their Families by the Foreign Sovereign Immunities Act Is Fully Reviewable on Appeal, and the Court Should Dispose of this Petition for Mandamus Without Addressing That Question.

FLAG's position is that the Executive Orders and Treasury Regulations[1] which extinguished the rights of the former hostages and their families to sue Iran gave rise to a right of compensation for the value of the extinguished claims. The fifth amendment prohibits the taking of private property for public use without just compensation. The hostage causes of action constituted private property, and, when the government extinguished those causes of action and forbade their being brought in any court or forum anywhere in the world by issuing Executive Orders and Treasury Regulations to that effect, it took the property rights of the former hostages and their families. Accordingly, under the fifth amendment, compensation is due.

Plainly one of the elements in the determination of what compensation is due will be a finding whether or not the causes of action could have been brought against Iran in United States courts under the relevant provisions of the Foreign Sovereign Immunities Act before those causes of action were extin-

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[1] President Carter's Executive Order 12283 of January 19, 1981, 46 Fed. Reg. 7927 (January 23, 1981), directed the Secretary of the Treasury to promulgate regulations prohibiting the prosecution of any claims against Iran arising out of the hostage seizure or detention. The Secretary has issued such regulations. Iran Assets Control Regulations, 46 Fed. Reg. 14,334 (February 26, 1981) (to be codified as 31 C.F.R. § 535.216). Executive Order 12283, along with President Carter's other orders implementing the Algiers Agreement, was ratified by President Reagan's Executive Order 12294 of February 24, 1981, 46 Fed. Reg. 14,111 (February 26, 1981).

guished. FLAG believes, and has argued elsewhere,[2] that the language of the Foreign Sovereign Immunities Act clearly authorizes suits against a foreign sovereign where the tortious actions which are the basis of the suit occur on "territory . . . subject to the jurisdiction of the United States," *see* 28 U.S.C. §§ 1605(a)(5) and 1603(c), and that the premises of the United States Embassy in Tehran, under the accepted principle of concurrent jurisdiction of both "sending" and "receiving" States over embassies abroad, qualify as such territory for purposes of the Act.

In this case, Judge Gesell addressed the sovereign immunity issue unnecessarily. In holding that the President acted within his authority in implementing the Algiers Agreement[3] by Executive Orders and Treasury Regulations which extinguished hostage causes of action against Iran, Judge Gesell had a basis sufficient in itself for dismissing the claims of petitioners. Moreover, subsequent to Judge Gesell's decision, this Court in *Dames & Moore* v. *Regan*, ____ U.S. ____ , 101 S.Ct. 2972, 2992 (1981), made clear that the proper approach to the question whether there had been a compensable taking was to reserve such issues for the Court of Claims: "to the extent petitioner believes it has suffered an unconstitutional taking by the suspension of the claims, we see no jurisdictional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act."[4] That conclusion plainly applies *a*

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[2] *See* Statement of Brice M. Clagett, Attorney for FLAG, Inc., before the President's Commission on Hostage Compensation, July 23, 1981; Brief *amicus curiae* of FLAG, Inc., filed in Persinger v. Islamic Republic of Iran, *appeal pending*, Civ. No. 81-2003 (D.C. Cir., docketed September 14, 1981); Brief *amicus curiae* of FLAG, Inc., filed in Ledgerwood v. State of Iran, Civ. No. 81-554 (D.D.C., filed March 9, 1981) (plaintiff's motion for default, filed November 10, 1981, pending).

[3] Declaration of the Government of the Democratic and Popular Republic of Algeria, 20 International Legal Materials 224-28 (1981).

[4] FLAG, in its *amicus* brief before this Court in *Dames & Moore*, *supra*, had argued for precisely this approach.

fortiori to the hostage claims, which were not merely transferred to an alternative forum (the Iran-United States Claims Tribunal), as were the commercial claims involved in *Dames & Moore*, but wiped out entirely and forbidden to be pursued anywhere in the world.[5]

Accordingly, Judge Gesell's ruling on the sovereign-immunity issue was both unnecessary and incorrect. However, the ruling is fully reviewable on appeal.[6] The fact that the sovereign-immunity rationale was one of two alternative grounds relied upon by Judge Gesell in dismissing petitioners' claims does not make the dismissal itself or the rationale therefor any less subject to direct appeal. Nothing prevents a Court of Appeals from affirming a lower court's judgment on one ground of decision and rejecting another, or from affirming solely on one ground, or from reversing on both grounds or on a wholly separate ground. Where a district court bases a decision on two independently sufficient grounds, and an appellate court affirms on one ground without passing on the other, the res judicata or collateral estoppel effect of the ground of decision not passed upon by the reviewing court does not survive. *E.g.*, 1B *Moore's Federal Practice* ¶ 0.416[2] at 2232 and authorities there cited; *Martin* v. *Henley*, 452 F.2d 295, 300 (9th Cir. 1971) ("If a court of first instance . . . bases its judgment on alternative grounds, and the reviewing court affirms the judg-

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[5] Justice Powell, concurring and dissenting in part in *Dames & Moore*, *supra*, reinforced the Court's position:

> "The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts."

101 S.Ct. at 2993.

[6] Precisely the same issue is on appeal in Persinger v. Islamic Republic of Iran, *supra* p. 3, where FLAG has filed an *amicus* brief setting out its arguments in detail.

ment on only one of the two grounds, refusing to consider the other, the second ground is no longer conclusively established.").

Rule 26 of this Court's rules, governing issuance of extraordinary writs such as the writ of mandamus, prescribes as one requirement for the issuance of such a writ a showing "that adequate relief cannot be had in any other form or from any other court." As outlined above, there is no reason to believe that the normal appellate process would not make "adequate relief" available to petitioners. Because of the ready availability of appellate review, Rule 26's requirement that there be present "exceptional circumstances warranting the exercise of the Court's discretionary powers" is not met either.

Extensive case law also makes it clear that, although one of the accepted uses of the writ of mandamus is to compel a lower court to exercise its jurisdiction when it is its duty to do so, "[e]ven in such cases appellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions which it was competent to decide and which are reviewable in the regular course of appeal." *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 26 (1943). *Accord, e.g., Ex parte Harding*, 219 U.S. 363, 369-72 (1911); *Ex parte Tiffany*, 252 U.S. 32, 37 (1920); *Helstoski* v. *Meanor*, 442 U.S. 500, 505-06 (1979). As this Court further elaborated in *Roche* v. *Evaporated Milk Association, supra*, "while a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure.. . ." 319 U.S. at 26. More recently, this Court has emphasized that the extraordinary nature of the mandamus remedy is suited only to extraordinary circumstances: "[w]hile the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction,' it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *Will* v. *United States*, 389 U.S. 90, 95 (1967).

In short, although FLAG agrees with petitioners that Judge Gesell ruled unnecessarily and incorrectly on the sovereign-immunity issue, there is no need for this Court to address that issue in the context of a petition for a writ of mandamus. The question is fully reviewable on appeal, and the circumstances of the case are not such as to justify invocation of the extraordinary remedy of mandamus.

CONCLUSION

For the reasons stated above, FLAG respectfully requests the Court to dispose of this petition for a writ of mandamus without reaching or addressing the question of the claimed sovereign immunity of Iran from suits arising out of tortious acts which occurred on the premises of the United States Embassy in Tehran.

Respectfully submitted,

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March 12, 1982

CERTIFICATE OF SERVICE

I hereby certify that three true copies of the foregoing Motion of FLAG, Inc., for Leave To File Brief *Amicus Curiae* and Brief were mailed, postage prepaid, to John P. Coale, Esq., 305 4th Street, N.E., Washington, D.C. 20002, attorney for petitioners Westley Williams, *et al.*, and to Thomas G. Shack, Esq., Christine Cook Nettesheim, Esq., John B. Beaty, Esq., Abourezk, Shack & Mendenhall, P.C., 1129 Twentieth Street, N.E., Suite 500, Washington, D.C. 20036, attorneys for the Islamic Republic of Iran and Ayatollah Khomeini, and to Kenneth S. Geller, Esq., Office of the Solicitor General, Room 5139, Department of Justice, Washington, D.C. 20530, and to Judge Gerhard A. Gesell, United States District Court for the District of Columbia, United States Courthouse, Washington, D.C. 20001, on this 12th day of March, 1982.

BRICE M. CLAGETT

Opposition

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Supreme Court, U.S.
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MAR 25 1982
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No. 81-1483

IN THE

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OCTOBER TERM, 1981

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Petitioners

On Petition For A Writ Of Mandamus To The District Court For The District Of Columbia

---

OPPOSITION TO THE MOTION OF FLAG, INC. FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1483

IN RE WESTLEY WILLIAMS, *et al.*,

Petitioners

OPPOSITION TO THE MOTION OF FLAG, INC. FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Petitioners oppose the Motion of FLAG, INC. for leave to file a Brief *Amicus Curiae*. FLAG, INC. has not adequately set forth the matter of their interests nor have they set forth facts or questions of law that have not been adequately addressed by Petitioners as required by Rule 36 of this Court. Applicant believes that the only proper forum for determination of the validity and value of hostage claims is in the Court of Claims. Of course, Petitioners disagree. Petitioner also avers that Applicant FLAG, INC. has never filed a single claim before the Court of Claims concerning any of its members, nor has FLAG, INC. filed any action concerning the imprisonment of any hostages in Iran in November of 1979.

If Petitioners are successful, their success can only help the interest of FLAG, INC. It would in fact open an alternative route for them to follow in pursuing hostage claims, i.e., a trial before a jury which traditionally results in better compensation than a trial before a Court. Applicants state that they believe that neither Petitioners nor Respondents adequately represent its views. They have not set forth reasons for believing that they

will not be adequately represented by the parties as required by Rule 36 in their Motion for leave to file an *Amicus Curiae*.

Applicants also state that they believe that the question is not properly presented for review in the Petition for a Writ of Mandamus, but they fail to state reasons why they assert it is not adequately presented as required by Rule 36 of this Court. Petitioners further point out that the question of presenting hostage claims to the Court of Claims is prayed in Petitioners third alternative in the Petition for a Writ of Mandamus to the District Court of the District of Columbia in the "Conclusion," third paragraph, page 26, where it is stated, "in the alternative, to order the U.S. District Court of the District of Columbia to vacate that part of its Order to dismiss addressing the taking issue thus opening the doors to the Court of Claims for Petitioners.

Petitioners argue that the interests of FLAG, INC. and those of Petitioners are the same that these interests are adequately represented by Petitioners therefore this Court need not grant Applicant's Motion. Paragraph 1 of Rule 36, Rules of the Supreme Court, states that "a motion to file such a brief *(Amicus Curiae)* when consent has been refused is not favored." In other words, the Rules of this Court present Applicant with a heavy burden of proof when consent has been refused. This burden has not been met by Applicant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to the Motion of FLAG, INC. For Leave to File a Brief *amicus curiae* was mailed, postage prepaid, to BRICE M. CLAGETT and PAUL G. GASTON, 1201 Pennsylvania Avenue, N.W., P.O. Box 7566, Washington, D.C. 20044, Attorneys for Amicus Curiae FLAG, INC., and to THOMAS G. SHACK, CHRISTINE COOK NETTESHEIM, JOHN B. BEATY, 1129 Twentieth Street, N.W., Suite 500, Washington, D.C. 20036, Attorneys for the Islamic Republic of Iran and Ayatollah Khomeini, and to KENNETH S. GELLER, Office of Solicitor General, Room 5139, Department of Justice, Washington, D.C. 20530, and to JUDGE GERHARD A. GESELL, United States District Court for the District of Columbia, United States Courthouse, Washington, D.C. 20001, on the 24 day of March 1982.

JOHN P. COALE